No. 95-31
No. 95-258

(1)
(5)

Supreme Court, U.S.
FILED
OCT 2 1995
CLERK

In the

# Supreme Court of the United States

October Term, 1995

SHANNON RICHEY FAULKNER, individually and on behalf of all others similarly situated,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent,*

and

JAMES E. JONES, JR., et al.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## OPPOSITION OF SHANNON RICHEY FAULKNER TO MEMORANDUM SUGGESTING MOOTNESS AND REPLY MEMORANDUM OF NANCY MELLETTE IN SUPPORT OF MOTION TO ADD PARTY OR INTERVENE

VALORIE K. VOJDIK
*Counsel of Record*
New York University
School of Law
137 MacDougal Street
New York, NY 10012
(212) 998-6550

ROBERT R. BLACK
23 Broad Street
P.O. Box 643
Charleston, SC 29402
(803) 577-5806

HENRY WEISBURG
THOMAS F. SWIFT
MARY K. WARREN
VANESSA BEEVER
Shearman & Sterling
153 East 53rd Street
New York, NY 10022
(212) 848-4000

SUZANNE E. COE
Arnold & Coe
408 North Church Street,
Suite C
Greenville, SC 29601
(803) 235-4505

## TABLE OF AUTHORITIES

Page(s)

### CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. art. III, § 2 ..... 4
Fed. R. Civ. P. 21 ..... 6,7
Fed. R. Civ. P. 24 ..... 6,8,10
Sup. Ct. Rule 12 ..... 7

### CASES

*Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968) ..... 6
*Carroll v. Blinken*, 768 F. Supp. 1030 (S.D.N.Y. 1991), *aff'd in part and rev'd in part on other grounds*, 957 F.2d 991 (2d Cir.), *cert. denied*, 113 S. Ct. 300 (1992) ..... 4,5
*DeFunis v. Odegaard*, 416 U.S. 312 (1974) ..... 2
*Dimond v. District of Columbia*, 792 F.2d 179 (D.C. Cir. 1986) ..... 9
*Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995) ..... 2,5,6
*Graves v. Walton County Bd. of Educ.*, 686 F.2d 1135 (1982) ..... 8
*Honig v. Doe*, 484 U.S. 305 (1988) ..... 5
*Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969) ..... 6
*In re Sierra Club*, 945 F.2d 776 (4th Cir. 1991) ..... 8
*Kuntz v. Shawmut Bank*, 488 U.S. 952 (1988) ..... 7
*Mills v. Green*, 159 U.S. 651 (1895) ..... 2
*Mullaney v. Anderson*, 342 U.S. 415 (1952) ..... 8
*Murphy v. Hunt*, 455 U.S. 478 (1982) ..... 1
*National Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381 (10th Cir. 1977) ..... 9
*National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) ..... 7
*Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976) ..... 2

*Preiser v. Newkirk*, 422 U.S. 395 (1975) ..... 1
*Rogers v. Paul*, 382 U.S. 198 (1965) ..... 9
*Sagebrush Rebellion, Inc. v. Watt*,
713 F.2d 525 (9th Cir. 1983) ..... 3
*Sanguine, Ltd. v. United States Dep't of Interior*,
736 F.2d 1416 (10th Cir. 1984), *cert. denied*,
479 U.S. 1054 (1987) ..... 9
*Sosna v. Iowa*, 419 U.S. 393 (1975) ..... 3
*Trbovich v. United Mine Workers of America*,
404 U.S. 528 (1972) ..... 8
*United States Parole Comm'n v. Geraghty*,
445 U.S. 388 (1980) ..... 3,4

Neither the Memorandum Suggesting Mootness (the "Memorandum") filed by The Citadel and the State of South Carolina ("Respondents"), nor their Opposition to the Motion to Add Party or to Intervene (the "Motion") filed by Nancy Mellette, has any merit.

1. The issues raised by the Petitions are vital and justiciable. Respondents argue that Shannon Faulkner "voluntarily" withdrew from The Citadel and, therefore, no longer has any personal stake in the outcome of this litigation. Memorandum at 2, 6. Neither the facts nor the law supports such a rigidly formalistic interpretation of Article III jurisdiction.

a. Ms. Faulkner is entitled to reapply for admission to The Citadel and, therefore, retains a personal stake in the outcome of this litigation. Ms. Faulkner did not graduate from The Citadel, but withdrew under tremendous pressure and illness, which Respondents do not dispute. She is not attending any other college at this time and has expressed an interest in reapplying if other women are admitted. Respondents do not dispute that, like male cadets who withdraw for medical reasons, Ms. Faulkner is entitled to reapply for admission and resume her education at The Citadel. Under these circumstances, she continues to have a personal stake in the outcome of this litigation, which will determine whether women will be permitted to attend The Citadel.

Respondents have not cited a single case where a court has dismissed the claim of a student challenging an educational policy where the student is still eligible to receive the benefit. They deliberately ignore recent precedent reflecting the Court's pragmatic approach toward mootness analysis in the class action context, instead citing a string of older cases which were not brought as class actions or which are otherwise distinguishable from the facts and circumstances of this case.[1]

---

[1] Respondents rely primarily upon mootness decisions in cases involving a single plaintiff that, unlike this case, were not brought as class actions. *See, e.g., Murphy v. Hunt*, 455 U.S. 478, 482 (1982); *Preiser v.*

(Footnote continues on following page)

Respondents also ignore that the legal battle continues unabated over the constitutionality of The Citadel's exclusion of women and its proposal to remedy that violation by segregating women in a separate and non-military program. In the five weeks since Shannon Faulkner withdrew, more than 50 women have written to The Citadel for applications and information about the Corps of Cadets; at least two women have submitted applications for admission, including Nancy Mellette. The district court has scheduled a trial for November 6, 1995 to review South Carolina's proposal for creating a separate and intentionally unequal, non-military program for women at Converse College. In addition, Respondents filed a petition for certiorari with this Court seeking review of the Court of Appeals' decision in *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995) ("*Faulkner II*"), that The Citadel's discriminatory admissions policy violates the right of Ms. Faulkner, and all women, to equal protection. Ms. Faulkner filed a memorandum in opposition to Respondents' petition, and Respondents do not contend that she has no interest in opposing their petition.

Ms. Faulkner has not been dismissed from the action below, and the United States continues to prosecute its claim. Her interest in defending the decision that her right to equal

---

(Footnote continued from preceding page)

*Newkirk*, 422 U.S. 395, 402 (1975); *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974). Although the plaintiff in *Mills v. Green*, 159 U.S. 651, 653 (1895), had sued on behalf of other citizens for an injunction permitting him to vote in one election, the Court held the "matter in issue in the case" had been mooted after the election occurred. In the instant case, the *matter* is not mooted: the United States remains a party, and Nancy Mellette and other women seek admission. While *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 430 (1976), was originally filed as a class action, there is no indication that the plaintiffs ever attempted to certify the class or to substitute other plaintiffs after the original named plaintiffs graduated from high school. As in *Pasadena*, the presence of the United States in this case insures that the case is not moot. Unlike the high school students in *Pasadena*, who had graduated from high school, Ms. Faulkner is entitled to reapply and complete her college education at The Citadel.

protection has been violated continues, as well as her interest in preserving her right to choose to attend the public college of her choice. Moreover, the district court has scheduled a hearing on October 3, 1995 for Ms. Faulkner's class certification motion, which has been pending for over two years. If class certification is granted, there will no longer be any issue concerning the mootness of Ms. Faulkner's petition for certiorari. *See Sosna v. Iowa*, 419 U.S. 393 (1975); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980).

Ms. Faulkner's petition seeks review of the blatantly unconstitutional "special equal protection test" adopted by the Fourth Circuit. The substantial legal question that it presents directly will affect the rights of Nancy Mellette and over 50 other young women who now seek admission to The Citadel.

b. *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), controls the situation at hand. The plaintiff in *Geraghty* was a prisoner who filed a class action challenging the legality of federal parole release guidelines. *Id.* at 391-92. The district court denied class certification and then granted summary judgment for the defendants. *Id.* at 393. The plaintiff appealed both the denial of class certification and the final judgment, but before the case reached the Supreme Court, the plaintiff was released from prison, raising the potential argument that his claims were moot. *Id.* at 394-95. The defendants argued, as Respondents do here, that "where no class has been certified, there is no party before the Court with a live claim, and it follows . . . that [the Court has] no jurisdiction . . . ." *Id.* at 401. The Court disagreed, holding instead that "an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied." *Id.* at 404.

The Court held that "mootness has two aspects: 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Id.* at 396 (citation omitted). The Court found that the controversy over the parole release guidelines was still a live dispute between the defendants "and at least some members of the class [the plain-

tiff] seeks to represent." *Id.* As evidence of the vitality of the controversy, the Court observed that prisoners currently affected by the guidelines had moved to intervene at the Supreme Court level. *Id.* In addition, the Court held that the prisoner plaintiff still had a personal stake in obtaining class certification. After a detailed discussion of "the flexible character of the Art. III mootness doctrine," *id.* at 400, the Court concluded that the named plaintiff had a personal stake in obtaining class certification and that the district court could determine whether he or another plaintiff would be an appropriate class representative on remand. *Id.* at 404-7.

The Court's reasoning, as well as its holding, is dispositive in the instant case, which mirrors *Geraghty*. The issues raised in Ms. Faulkner's petition for certiorari are clearly live for Nancy Mellette and the scores of other women who want to attend the military-style program at The Citadel. As in *Geraghty*, the motions of Nancy Mellette to intervene in the district court and this Court evidence the continued vitality of this dispute, as do the many inquiries and applications from women that have poured into The Citadel since Ms. Faulkner's withdrawal. Even were it determined that she had no other stake in this litigation, *Geraghty* illustrates that Ms. Faulkner has a personal stake in obtaining certification of a plaintiff class in the district court. Her interest is even more compelling than that of the *Geraghty* plaintiff, since her motion for class certification has not been denied, but rather has not yet been ruled on by the district court.

c. In addition, Ms. Faulkner's claim is not moot because it falls within the "capable of repetition, yet evading review" exception to the mootness doctrine. The Citadel continues to unlawfully exclude all women, including Nancy Mellette, from admission. Moreover, the possibility Ms. Faulkner may reapply for admission alone is sufficient to prove that The Citadel's discriminatory policy is "capable of repetition." In *Carroll v. Blinken*, 768 F. Supp. 1030, 1031 n.1 (S.D.N.Y. 1991), *aff'd in part and rev'd in part on other grounds*, 957 F.2d 991, 993 n.2 (2d Cir.), *cert. denied*, 113 S. Ct. 300 (1992), the Second Circuit cited with approval the refusal of the dis-

trict court to dismiss as moot the First Amendment claim of a college student who was dismissed from school for academic reasons after filing the action. *See also Honig v. Doe*, 484 U.S. 305, 318 (1988). Like Ms. Faulkner, the plaintiff had not applied for readmission, but the court nevertheless held that, under the school's policy, "he may choose to do so, and it is reasonable to expect that he would then again raise the same claim which was fully litigated in the trial before me." *Carroll*, 768 F. Supp. at 1031.

Contrary to Respondents' assertion, the duration of the challenged action is too short to permit the litigation of its constitutionality. The harm suffered by Ms. Faulkner and other women is the denial of their choice and ability to attend The Citadel. That harm does not automatically continue for four years, as Respondents suggest. Because The Citadel does not permit students to transfer into its program after the beginning of their junior year, Ms. Faulkner and other women at best have only two years in which to litigate their claims. This case, which has been expedited by the district court and the court of appeals, has already lasted over two and one-half years. The protracted length of this litigation proves beyond a doubt that an individual woman is unlikely to attain any affirmative relief in two years.

d. To declare Ms. Faulkner's petition moot would not serve the ends of justice or equity, but only assist The Citadel and South Carolina in insulating themselves from any meaningful review of the decision below. Respondents have filed a petition for certiorari, asking this Court to review the liability determination of *Faulkner II*. If neither Ms. Faulkner nor Ms. Mellette is permitted to challenge the remedial portion of *Faulkner II*, Respondents will likely argue that they are barred from raising that issue again. "[W]hile an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it." *Honig*, 484 U.S. at 331 (Rehnquist, J., concurring). This case surely presents such reasons.

2. Nancy Mellette is entitled to be added as a party to the petitions under Rule 21 or, alternatively, to intervene under Rule 24 of the Federal Rules of Civil Procedure. Respondents do not dispute that Nancy Mellette has a substantial interest in attending The Citadel that is likely to be determined by the outcome of this litigation. No other party in *Faulkner* or *VMI* is raising the same constitutional questions as those presented in Ms. Faulkner's petition, adopted by Ms. Mellette. If Ms. Mellette is forced to work her way up from the district court to raise the same issues now presented by Ms. Faulkner's petition, the courts, the parties and the taxpayers of South Carolina will be needlessly burdened by Respondents' litigation strategy. Joinder at this point in the litigation promotes judicial economy and saves expense for all parties.

a. Respondents assert that Ms. Mellette has not sought to intervene in this case and that she is not entitled to intervene in the two petitions because Ms. Faulkner's petition is moot. Respondents' argument is pure sophistry. First, Ms. Mellette has filed a motion to intervene in the underlying action in the district court, which is scheduled for argument on October 3, 1995. Second, Ms. Mellette is entitled to intervene to petition this Court for certiorari to review the decision below in *Faulkner II*, regardless of whether this Court dismisses Ms. Faulkner's petition on grounds of mootness. A new party is permitted to intervene in this Court under Fed. R. Civ. P. 24 regardless of whether an existing party has filed a petition for certiorari. This Court has granted leave to intervene to file a petition for certiorari to persons who were not parties in the courts below even where no petition is pending regarding the lower court ruling at issue. *See Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969) (petitioner, not party to proceedings below, permitted to intervene to file petition for certiorari even where party who had represented petitioner below declined to seek certiorari); *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968) (same). Nancy Mellette, like the petitioners in *Hunter* and *Banks*, has interests that will be vitally affected by this litigation. Even assuming

*arguendo* that Ms. Faulkner's claims are moot, Nancy Mellette is entitled to intervene independently for purposes of filing her own petition.[2]

b. Respondents incorrectly assert that Nancy Mellette is jurisdictionally barred from filing a petition for certiorari because her Motion was filed more than 90 days after the decision below was entered. Respondents are invoking the wrong deadline. Ms. Mellette's Motion, which adopts in full Ms. Faulkner's petition for certiorari, was filed on September 11, 1995, within 30 days after Respondents filed their petition for certiorari on August 11, 1995. Under Supreme Court Rule 12.3, Nancy Mellette's Motion qualifies as a cross-petition for certiorari.[3] By adopting the petition for certiorari filed by Ms. Faulkner, Ms. Mellette satisfied all of the requirements of Rule 12.3 governing a cross-petition's form and substance.

c. Respondents also assert that Ms. Mellette is not entitled to be added as a party to the petition under Fed. R. Civ. P. 21 because the Rule "contemplates the retention of one or more parties in the action" and should not be used to substitute the sole plaintiff in a case with another party. Because the United States remains a party to the *Faulkner* litigation, the addition of Ms. Faulkner would not create a case or controversy where none presently exists. Even assuming that Ms. Faulkner was the sole plaintiff in this action, courts have used Rule 21 to add additional parties to substitute for plain-

---

[2] The cases cited by Respondents are plainly inapplicable. Each involve attempts to intervene or add parties to actions that were jurisdictionally defective *when originally filed*. Ms. Faulkner indisputably had standing to commence this action and to file this petition.

[3] The Court has construed various pleadings liberally as petitions for certiorari when it wished to address the questions presented therein. *See, e.g., Kuntz v. Shawmut Bank*, 488 U.S. 952 (1988) (petition for writ of mandamus treated as petition for certiorari); *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44 (1977) (application for stay treated as petition for certiorari).

tiffs whose claims have become moot. *See, e.g., Graves v. Walton County Bd. of Educ.*, 686 F.2d 1135 (1982).

d. Respondents' attempts to distinguish *Rogers v. Paul*, 382 U.S. 198 (1965), and *Mullaney v. Anderson*, 342 U.S. 415 (1952), are unavailing. Respondents argue that *Rogers* is inapplicable because the petition was not moot since one of the original named plaintiffs was still in high school. Respondents neglect to mention that that plaintiff was in the middle of his last year of high school, which under Respondent's analysis would obviously render moot the plaintiff's interest in a desegregated high school system to be implemented in the future. *See Rogers*, 382 U.S. at 199. Respondents attempt to distinguish *Mullaney* on the ground that the parties added in that case were respondents, not petitioners. Aside from the fact that Nancy Mellette too seeks to be added as a respondent in the petition brought by The Citadel and South Carolina, *Mullaney* is applicable because the original respondents were the parties plaintiff who had instituted the lawsuit. *Mullaney*, 342 U.S. at 416-17. If they were deemed without standing, the Court acknowledged, the parties would have to start over in the district court unless addition of the new respondents was permitted. *Id.* The same rationale applies to the addition of Ms. Mellette.

e. Nancy Mellette's intervention is necessary under Fed. R. Civ. P. 24(a) and appropriate under Fed. R. Civ. P. 24(b). Contrary to Respondents' assertion, the United States is quite obviously not an adequate representative for Ms. Mellette's interests. The presence of the United States as a plaintiff does not preclude intervention.[4] Clearly the adverse positions taken by the United States and Ms. Faulkner on petition for certio-

---

[4] *See Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538-39 (1972) (concluding that "sufficient doubt about the adequacy of representation [existed] to warrant intervention" by a union member where the Secretary of Labor had two different, "related but not identical" duties: to serve union members and to protect the public interest); *In re Sierra Club*, 945 F.2d 776 (4th Cir. 1991) (denial of intervention re-

(Footnote continues on following page)

rari constitute an adversity of interest between the parties, even under the standard advocated by Respondents in the cases cited on pages 6-7 of their Opposition. The United States, recognizing that the interests of the United States and the individual plaintiffs have already diverged, supports Nancy Mellette's motion to intervene in the district court. A Department of Justice trial attorney described the United States' position during a hearing before the district court:

> We do enforce the law as we understand the law in light of what the priorities of the state are. But they are not necessarily the same interest [sic] as a private plaintiff or a private plaintiff class. So we generally work congenially with our fellow plaintiffs, but sometimes we make very different decisions.

September 23, 1994 Hearing Transcript ("Tr.") at 39-40. The Department of Justice attorney further described for the district court how political considerations, in civil rights cases as well as generally, can result in the United States' failing to take an appeal, or changing its view of the law in the middle of a case, or otherwise departing from the course followed by a private plaintiff. *See* September 23, 1994 Hearing Tr. at 35-48; February 17, 1994 Hearing Tr. at 28 *et seq*.

Finally, Respondents erroneously assert that the requirement of adequate representation applies to permissive inter-

---

(Footnote continued from preceding page)
versed on ground that state agency might not be adequate representative for citizen members of environmental group); *Dimond v. District of Columbia*, 792 F.2d 179 (D.C. Cir. 1986); *Sanguine, Ltd. v. United States Dep't of Interior*, 736 F.2d 1416 (10th Cir. 1984), *cert. denied*, 479 U.S. 1054 (1987) (denial of intervention reversed on ground that facts showed United States might not be adequate representative of private intervenors); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983) (denial of intervention reversed where facts showed United States might not adequately represent interests of private intervenors); *National Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381 (10th Cir. 1977).

vention as well as intervention of right. None of the cases cited by Respondents remotely supports this proposition. Their contention directly contradicts the language of Fed. R. Civ. P. 24(b)(2), which does not require any showing of inadequate representation.

*****

For the foregoing reasons, the Court should grant Ms. Mellette's Motion to Add Party or to Intervene and disregard Respondents' Memorandum Suggesting Mootness.

Dated: New York, New York
October 2, 1995

*Respectfully submitted,*

Henry Weisburg
Thomas F. Swift
Mary K. Warren
Vanessa Beever
SHEARMAN & STERLING
Citicorp Center
153 East 53rd Street
New York, NY 10022
(212) 848-4000

Suzanne E. Coe
ARNOLD & COE
408 North Church Street,
Suite C
Greenville, SC 29601
(803) 235-4505

Valorie K. Vojdik
*Counsel of Record*
New York University
School of Law
137 MacDougal Street
New York, NY 10012
(212) 998-6550

Robert R. Black
23 Broad Street
P.O. Box 643
Charleston, SC 29402
(803) 577-5806